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March 8, 2002

**BY HAND DELIVERY**

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
236 Massachusetts Avenue, N.E.  
Suite 110  
Washington, D.C. 20002

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MAR - 8 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: Reallocation and Service Rules for the 698-746  
MHz Spectrum Band (Television Channels 52-59)  
GN Docket No. 01-74

Dear Mr. Caton:

Transmitted herewith on behalf of The WB Television Network are an original and four copies of a "Petition for Reconsideration," which is being filed in the above-referenced rulemaking proceeding.

Should any questions arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,

DICKSTEIN SHAPIRO MORIN  
& OSHINSKY LLP



Andrew S. Kersting  
Counsel for  
The WB Television Network

Enclosure

cc (w/ encl.): Certificate of Service (by hand)

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FEDERAL COMMUNICATIONS COMMISSION  
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OFFICE OF THE SECRETARY

In the Matter of

Reallocation and Service Rules  
for the 698-746 MHz Spectrum Band  
(Television Channels 52-59)

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GN Docket No. 01-74

To: The Commission

PETITION FOR RECONSIDERATION

THE WB TELEVISION NETWORK

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March 8, 2002

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As demonstrated herein, the Commission should reconsider its decision concerning the pending applications for new NTSC stations and permit them to provide an analog service on channels 52-58. The Commission also should reconsider its dismissal of the pending rulemaking petitions seeking the allotment of new analog channels and reinstate those petitions. In doing so, the Commission should permit the pending rulemaking petitions to propose either an analog or digital service on channels 2-58.

In processing the pending applications and allotment rulemaking petitions, the Commission should waive its technical rules, including the distance separation requirements, where the applicant or rulemaking petitioner demonstrates that the proposed new allotment will not cause prohibited interference to another television station, or, alternatively, the requested waiver is consistent with the types of waivers that the Commission previously has granted in the application context. Furthermore, because the proposals for new NTSC stations have been pending before the Commission since at least September 1996, and the Mass Media Bureau (the "Bureau") took it upon itself to implement an informal processing "freeze," whereby it refused to grant any of the pending NTSC proposals during the pendency of this proceeding, the Commission should expressly direct the Bureau to expeditiously grant the pending NTSC proposals.

## **II. NTSC Applications Should Be Permitted to Propose an Analog or Digital Service Outside the Core.**

### **A. The Commission's Stated Rationale Does Not Support Its Decision.**

In support of its decision to require pending NTSC applications to propose a new television service inside the core or a digital service on channels 52-58, the Commission offered the following rationale: (1) authorizing new analog stations on channels 52-58 is not "consistent with our statutory mandate to reclaim this spectrum for new services" (*REC* at ¶45); (2) authorizing new analog stations on channels outside the

core “at this stage in the DTV transition” “would be inconsistent with our goal of achieving a rapid conclusion of the transition” (*id.*); (3) refusing to authorize new analog stations on channels 52-58 would avoid complications that could arise in requiring licensees to convert their analog operation to digital service relatively soon after they commence analog operation (*id.*); and (4) new service licensees “may be able to co-exist more easily with digital television stations given that such stations operate with lower power and their signals may generally be less susceptible to interference than analog television signals.” *Id.*

The Commission’s stated rationale is inherently inconsistent and does not support its refusal to authorize any new analog stations in the lower 700 MHz band. The fact that existing stations must cease operating on channels 52-58 at the end of the transition period could provide a basis for the Commission’s decision not to authorize new analog stations in the lower 700 MHz band. However, the Commission’s rationale is significantly undercut by its decision to authorize new DTV stations in the same spectrum band. It is no more difficult for an analog station to cease operating in the lower 700 MHz band at the end of the transition period than it is for a digital station to cease operating. In either case, the station must cease operating at the end of the transition period and either commence or resume digital operations on a new channel inside the core. Thus, the Commission’s refusal to authorize new analog stations outside the core on the basis that it would be inconsistent with the Commission’s duty to reclaim that spectrum at the end of the transition period is inherently inconsistent with its decision to authorize new digital stations in the same spectrum band.

The Commission also claims that the authorization of new analog stations on channels 52-58 would be “inconsistent” with the transition to digital television. This

rationale is questionable, however, because consistent with *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, MM Docket No. 87-268, *Second Memorandum Opinion and Order on Reconsideration of the Fifth and Sixth Report and Orders*, 14 FCC Rcd 1348, 1367-68 (1998), the Commission is continuing to process pending proposals for new NTSC stations to operate on channels inside the core. As one example, the Commission recently held an auction for four new analog stations, all of which will operate on in-core channels.<sup>1</sup> The *RCO* does not explain how the authorization of a new analog station on Channel 51 at Pittsfield, Massachusetts is consistent with the transition to DTV, but authorizing a new analog station to operate, for example, on Channel 55 at Fairmont, West Virginia is not. The authorization of new analog television stations on channels 52-58 will have no more adverse impact on the transition to DTV than the authorization of new analog stations inside the core.

Requiring new television stations on channels 52-58 to provide a digital service not only is inconsistent with the continued authorization of new analog stations inside the core, but it is not reasonably related to achieving the Commission's stated goal of promoting the transition to DTV. The channel upon which a new television station operates has no relevance whatsoever to its effect upon the transition to DTV. Indeed, if the Commission were genuinely concerned that the authorization of new analog stations would adversely affect the DTV transition, it would require all new television stations to provide a digital service. Therefore, the Commission's stated rationale that the

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<sup>1</sup> See *Public Notice, New Analog Television Stations – Auction Closes – Winning Bidders Announced*, DA 02-355 (released February 15, 2002) (announcing the winning bidders for four new analog stations at Columbia, South Carolina; Pittsfield, Massachusetts; Magee, Mississippi; and Scottsbluff, Nebraska) (“Auction No. 82”).

authorization of new analog stations in the lower 700 MHz band would somehow hamper the transition to DTV does not support the Commission's decision in the *ReO*.

The Commission's third rationale for requiring new stations in the lower 700 MHz band to provide a digital service is also unavailing. As reflected in the recent Auction No. 82, many of the pending NTSC proposals, including those proposing a new analog station inside the core, require the Commission to accept additional competing applications and hold an auction before issuing a construction permit for the new analog station. The Commission's desire to avoid potential "complications that could arise in requiring licensees to convert their analog operation to digital" relatively soon after they commence analog service does not support its refusal to authorize new analog stations on channels 52-58 because these concerns are equally applicable to new analog stations operating inside the core. Indeed, analog stations operating in the lower 700 MHz band will have no greater difficulty converting to digital operations at the end of the transition period than those recently-authorized analog stations operating on channels 2-51.

As noted above, the Commission also claims that new service providers "may be able to co-exist more easily" with DTV stations because they operate with lower power and "may generally be less susceptible to interference" than analog stations. *ReO* at ¶45. The Commission's stated rationale does not support the Commission's refusal to authorize any new analog stations in the lower 700 MHz band because it is entirely speculative and fails to account for the substantial number of existing stations that will continue to operate in the lower 700 MHz band until the end of the transition period.

As a general proposition, digital stations will operate with less power than most analog stations. Nevertheless, the Commission's tentative language – *i.e.*, "*may* be able to co-exist more easily" and "*may generally* be less susceptible to interference" (*ReO* at ¶45)



(emphasis added) – demonstrates the tenuous nature of the Commission’s position. The *R&O* does not contain any evidence to support the Commission’s general proposition regarding the power levels of analog and digital stations or their relative susceptibility to interference. Although there may be some instances where new service licensees could co-exist more easily with digital stations than analog stations, that will not be true in every case. The substantial differences in operating power among analog and DTV stations, the location of their transmitters, and the location of the transmitters of the new service licensees all will affect the extent to which new service licensees may cause interference to stations operating in the lower 700 MHz band.

Furthermore, the Commission’s rationale does not account for the substantial number of stations already authorized in the lower 700 MHz band. *See R&O* at ¶40. If the proposed new analog stations were the only stations that would be operating in that spectrum band, the Commission’s generalized assumptions about the lower power levels of DTV stations and the possibility that they may be less susceptible to interference might have some validity. However, the proposed new analog stations that would operate on channels 52-58 should not be viewed alone, but, rather, must be considered together with the 101 analog stations and 166 DTV stations that are likely to continue operating in the lower 700 MHz band until the end of the transition period.<sup>2</sup> Indeed, there has been no change in Congressional intent with respect to the lower 700 MHz band remaining “principally a television band until the end of the transition” period.<sup>3</sup> Analog stations operating on channels 52-59 are entitled to continue to operate until the end of the

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<sup>2</sup> *See R&O* at ¶39 and n.111.

<sup>3</sup> *Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Notice of Proposed Rule Making, GN Docket No. 01-74, 16 FCC Rcd 7278, 7291 (2001) (“Notice”).

transition period.<sup>4</sup> The Commission itself has recognized that “[t]he degree of incumbency in the Lower 700 MHz Band – consisting of both digital and analog broadcasters – is likely to make it far more difficult for new services to operate in this band . . . prior to the end of the transition.” *RCO* at ¶38. Therefore, although digital stations generally may operate with lower power than some analog stations and *may* be less susceptible to interference from new services under certain circumstances, this is only marginally relevant because any new licensees that begin providing new services in the lower 700 MHz band prior to the end of the transition period must protect the substantial number of existing analog and DTV stations (267 in the aggregate) that are likely to continue operating in the lower 700 MHz band until the end of the transition period.<sup>5</sup>

As demonstrated above, the Commission’s stated rationale for requiring the pending applications for new NTSC stations to operate on a channel inside the core or provide a digital service on channels 52-58 is inherently inconsistent and does not provide a reasoned basis for its decision. Moreover, due to the shortage of available in-core channels, the Commission’s decision is likely to result in the ultimate dismissal of many pending NTSC applications, including at least eight (8) of which would promote the objectives of Section 307(b) of the Communications Act of 1934, as amended (the “Act”), by providing

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<sup>4</sup> 47 U.S.C. §309(j)(14)(A) and (B).

<sup>5</sup> The Commission explicitly recognized the need to protect existing broadcasters operating on channels 52-59:

The degree of incumbency in this band also underscores the importance of adopting rules that insure that new licensees provide adequate protection to incumbent broadcasters. We emphasize that we have an obligation to fully protect incumbent full-power analog and digital broadcasters during the transition period, and adopt rules that support this core value.

*RCO* at ¶38.

a first local television service to the proposed community of license.<sup>6</sup> Therefore, the Commission should reconsider its decision and permit the pending NTSC applications to propose an analog service outside the core.

B. The Commission's Refusal to Authorize New Analog Stations in the Lower 700 MHz Band Is Due to the Upcoming Auction Deadline.

Despite its stated rationale, the Commission's underlying concern with respect to authorizing new analog stations in the lower 700 MHz band is that the Commission currently is facing a statutory deadline for completing the auction of this spectrum band and reporting the auction revenues to Congress by September 30, 2002. *See* 47 U.S.C. §309(j)(14)(C)(ii). It is extremely unlikely, however, that the Commission will be able to clear the lower 700 MHz spectrum band prior to the end of the transition period.

As stated above, there currently are 101 authorized NTSC stations and 166 DTV stations (including licenses, construction permits, and pending applications) on the eight (8) television channels in the lower 700 MHz band. *RCO* at ¶39 and n.111. Thus, there currently are a total of 267 stations in the lower 700 MHz band without considering the pending proposals for new NTSC stations.

At the time the *Notice* was adopted, there were approximately 57 requests for new NTSC stations in the Channel 52-59 spectrum band, including both applications and allotment rulemaking petitions. 16 FCC Rcd at 7291. There also are four DTV allotment petitions filed by parties that originally proposed NTSC stations. *RCO* at ¶30 n.111. Since the *Notice* was issued, a number of the NTSC proposals have been dismissed because

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<sup>6</sup> Those pending NTSC applications which would provide the proposed community with a first local service include the following: Warner Robbins, Georgia; Galesburg, Illinois; Hammond, Louisiana; New Iberia, Louisiana; Waverly, New York; Franklin, North Carolina; Hampton, Virginia; and Fairmont, West Virginia.

the Bureau found them to be technically defective. *Id.* at ¶40 n.115. Many of the pending proposals for new NTSC stations cannot be granted for a variety of reasons.<sup>7</sup> Therefore, the NTSC proposals that currently remain pending and the even fewer which are grantable would constitute only a negligible increase in the 267 analog and DTV stations already authorized to operate in the lower 700 MHz band.

In the *Notice*, the Commission recognized that “given the significant number of analog and DTV incumbents that already exist in this band,” the pending NTSC proposals will have, at most, only a marginal impact on the proposed new services and the ability to clear the Channel 52-59 spectrum band prior to the end of the transition period. 16 FCC Rcd at 7291. Similarly, in the *ReO*, the Commission stated that “[t]he degree of incumbency in the Lower 700 MHz Band – consisting of both digital and analog broadcasters – is likely to make it far more difficult for new services to operate in this band, particularly in major metropolitan markets, prior to the end of the transition.” *ReO* at ¶38. The possibility of clearing the lower 700 MHz band has been made even more difficult by the band clearing proposals adopted in the Upper 700 MHz proceeding in which the Commission stated that it would permit stations operating on channels 60-69 to relocate into the lower 700 MHz band on a temporary basis.<sup>8</sup>

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<sup>7</sup> As an example, there currently are mutually exclusive modification proposals pending for Ashland, Kentucky; Charleston, West Virginia; and Fairmont, West Virginia, all of which seek to modify the original proposal and substitute Channel 55 for the existing channel allotment in each of those communities. Due to the shortage of available channels in this area, it may be that not all of these three proposals can be granted. There also are mutually exclusive allotment proposals on file for Plaquemine and Hammond, Louisiana, both of which seek the allotment of Channel 57.

<sup>8</sup> *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, WT Docket No. 99-168, *et al.*, *Third Report and Order*, 16 FCC Rcd 2703, 2718 (2001).

In light of the significant incumbency of the lower 700 MHz band and the Commission's decision to permit stations operating on channels 60-69 to move into that band on a temporary basis, there is a substantial likelihood that only a very small portion (if any) of the lower 700 MHz band will be cleared prior to the end of the transition period. Indeed, the Commission itself has repeatedly stated that it is very unlikely the band will be cleared prior to the end of the transition period. As a result, the authorization of new analog stations to operate on channels 52-58 until the end of the transition period will have no more than a *de minimis* impact on the commencement of new wireless services or the ability to clear the lower 700 MHz band prior to the end of the transition period. The Commission should therefore reconsider its decision concerning pending NTSC applications and permit those applications to provide analog service outside the core.

C. The Lower 700 MHz Auction is Likely To Be Postponed.

There is a substantial likelihood that the auction for the lower 700 MHz spectrum band is going to be postponed for several years. A budget compromise was reached in May 2001 between the Senate, House of Representatives, and the White House that would delay the auctions for the upper and lower 700 MHz bands until 2004 and 2006, respectively.<sup>9</sup> The Bush Administration recently reaffirmed its earlier proposal in its budget proposal for Fiscal Year 2003. The Administration's proposal states in pertinent part:

The Administration will propose legislation to provide more certainty in upcoming auctions. The legislation will establish a framework for the FCC to develop regulations that promote clearing the spectrum in television channels 60-69 (747-762 and 777-792 MHz) for new wireless services in an effective and equitable manner. *Such legislation also would shift the statutory deadlines for the auction of channels 60-69*

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<sup>9</sup> See Appendix A hereto, containing relevant portions of H.R. Conf. Rep. No. 107-60, at 72-73 (2001); Executive Office of the President and Office of Management and Budget, Budget of the United States Government, Fiscal Year 2002, Undistributed Offsetting Receipts at 150 (2001).

*from the elapsed 2000 date to 2004 and for the auction of channels 52-59 (698-746 MHz) from 2002 to 2006. Providing more certainty about how and when the spectrum in channels 60-69 will become available to new entrants and shifting the deadlines for both auctions would increase expected revenues by \$6.7 billion.<sup>[10]</sup>*

The WB recognizes that the auction deadline of September 30, 2002, contained in Section 309(j)(14)(C)(iii) of the Act remains unchanged as of this date. Nevertheless, the Commission previously exercised its discretion in postponing the auction for the upper 700 MHz band in response to Congressional concerns regarding the continuing uncertainty with respect to how and when the upper 700 MHz spectrum band would become available for advanced wireless and public safety uses. The WB respectfully submits that, in light of (i) the significant incumbency of the lower 700 MHz band; (ii) the Commission's admissions that it is very unlikely that the band will be cleared prior to the end of the transition period; (iii) the May 2001 budget compromise; and (iv) the Bush Administration's current budget proposal that the auction for the lower 700 MHz band be postponed until 2006; the Commission should exercise the same discretion and postpone the auction for the lower 700 MHz band at least until Congress has had an opportunity to act on the Bush Administration's budget proposal for Fiscal Year 2003. The Commission's effort to hold the auction for the lower 700 MHz band when there is such great uncertainty regarding how and when the spectrum will be available for advanced wireless and other new services would result in substantially less revenue for the Federal Treasury, the loss of which could never be recouped. Moreover, the Commission's decision to proceed with the scheduled auction and resulting determination not to authorize any new analog stations in the lower 700 MHz band unnecessarily precludes the commencement of

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<sup>10</sup> Executive Office of the President and Office of Management and Budget, Budget of the United States Government, Fiscal Year 2003, Other Agencies at 384 (2002) (emphasis added) (relevant portion appended hereto as Appendix B).

new analog television services, including many that would promote the objectives of Section 307(b) of the Act by providing a first local television service to the designated community.

### **III. The Rulemaking Petitions Should Be Reinstated and Permitted to Propose Analog or Digital Service Outside the Core.**

As stated above, there are 12 rulemaking petitions seeking the allotment of new NTSC stations and four DTV allotment petitions that originally proposed new analog allotments. Collectively, these allotment petitions constitute less than 6% of the 267 analog and DTV stations that are authorized to operate in the lower 700 MHz band. *See R&O* at ¶39 and n.111. Even assuming, *arguendo*, that all of the rulemaking petitions were to be granted, the proposed new analog and digital stations would have no more than a *de minimis* impact on the commencement of new wireless services or the ability to clear the lower 700 MHz band prior to the end of the transition period.

The Commission's rationale for dismissing these petitions is essentially the same as that discussed in Section II above with respect to the Commission's decision that pending applications must specify an in-core channel, or, alternatively, propose a digital service on channels 52-58. Specifically, the Commission stated that the pending rulemaking petitions are inconsistent with the transition to DTV and that the Commission is required to reclaim the lower 700 MHz band for new services. The Commission also stated the pending applications "are generally further along in the regulatory process and thus could potentially provide service to the public on a more near-term basis." *R&O* at ¶45.

For the reasons stated in Section II above with respect to the pending applications, the Commission's first two bases for dismissing the pending rulemaking petitions are unavailing. Moreover, it simply is not true that the pending applications are

generally further along in the regulatory process than the rulemaking petitions. As just one example, there currently are applications pending for new analog stations at Charleston, West Virginia; Fairmont, West Virginia; and Richland Center, Wisconsin. Each of these NTSC proposals involves a pending application for the existing allotment as well as a petition for rulemaking seeking to modify the existing channel allotment. Before any new station can commence service at any of those communities, the Commission must (i) initiate a notice and comment allotment rulemaking proceeding; (ii) adopt a Report and Order allotting the new channel; (iii) issue a public notice announcing a filing window for the acceptance of additional applications for the new NTSC facility; and (iv) in the event more than one application is filed, hold a public auction for the new analog station.

The processing procedure that the Commission must follow for the pending Charleston, Fairmont, and Richland Center applications is no different from the procedure that would be necessary to authorize a new television station pursuant to the pending rulemaking petitions seeking a new channel allotment at Boynton Beach, Florida; Plaquemine, Louisiana; and Westbrook, Maine. Although there is no existing channel allotment in any of those communities, the processing procedure for each of these proposals would be identical to that set forth in (i) through (iv) in the preceding paragraph. Therefore, there is no factual basis for the Commission's assertion that the pending applications for new NTSC stations are further along in the regulatory process than the pending rulemaking petitions (which had an earlier filing deadline),<sup>11</sup> nor that they are any closer to commencing new television service.

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<sup>11</sup> The deadline for filing rulemaking petitions for new NTSC stations was July 25, 1996. The deadline for filing applications for new NTSC stations was September 20, 1996. *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, *Sixth Further Notice of Proposed Rule Making*, 11 FCC Rcd 10968, 10992-93 (1996) ("Sixth Further Notice").



The only instance in which a pending application would, in fact, be further along in the regulatory process would be where an application does not involve an associated rulemaking petition seeking to modify the existing channel allotment. Based on a review of the pending applications and associated rulemaking petitions on file at the Commission, The WB believes there are very few, if any, pending applications for new analog stations in the lower 700 MHz band that do not involve an associate rulemaking petition requesting a modification of the existing channel allotment.

Although a select few of the pending applications are part of a pending settlement proposal, the applications which are proposed for grant under those settlement proposals are only slightly “further along in the regulatory process.” As is the case with respect to the other pending applications or allotment rulemaking petitions, the Commission must (i) conduct a notice and comment rulemaking proceeding proposing the modified channel allotment; (ii) issue a Report and Order allotting the new channel; (iii) review the parties’ settlement proposal and issue a public notice announcing the acceptance for filing of the application proposed for grant; and (iv) process any petitions to deny or other pleadings challenging the proposed grant of the prevailing application. Thus, although applications that are part of a settlement proposal are cut off from additional competing applications and Commission is not required to hold an auction, because the filing of an opposition pleading can delay or altogether preclude a grant of the prevailing application, there is no assurance that the mere pendency of a settlement proposal means the proposed station is any closer to providing new service to the public.

Furthermore, like the pending applications for new analog stations, the rulemaking petitions also would provide substantial public interest benefits. At least ten

(10) of the pending rulemaking petitions would promote the objectives of Section 307(b) of the Act by providing the designated community with a first local television service.<sup>12</sup>

Although the Commission noted that those parties whose rulemaking petitions were dismissed by the *RFO* may file petitions for rulemaking seeking the allotment of new DTV stations, this is not a practical alternative. The Commission is well aware that there are very few, if any, channels available for either analog or digital use in many parts of the country. That is the very reason that so many of the pending applications and allotment rulemaking petitions have been amended to specify channels outside the core. Indeed, the Boynton Beach, Florida and Bartlett, Tennessee proposals were amended to request the allotment of a new DTV channel because there are no analog channels available in those markets. The shortage of available channels also is reflected in the fact that the applicants for Ashland, Kentucky; Charleston, West Virginia; and Fairmont, West Virginia all sought to modify their existing allotment by proposing the allotment of Channel 55 in each of those communities. Therefore, it is extremely unlikely that any petitioner whose allotment proposal is dismissed will be able to find a fully-spaced DTV channel available for allotment to the same or nearby community.

Finally, there is no basis to distinguish between applications and allotment rulemaking petitions on the theory that the pending applicants have a greater investment in their pending NTSC proposal. In the case of at least nine (9) of the pending rulemaking petitions that were dismissed by the *RFO*, the petitioner also filed an accompanying

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<sup>12</sup> Those rulemaking petitions which would provide a first local service are the following: Oro Valley, Arizona; Benton, Arkansas; Boynton Beach, Florida; Meridian, Idaho; Derby, Kansas; Plaquemine, Louisiana; Westbrook, Maine; Rio Rancho, New Mexico; New Castle, Pennsylvania; Bartlett, Tennessee; and Toole, Utah. As noted above, the pending rulemaking petitions for Boynton Beach, Florida and Bartlett, Tennessee, which originally proposed a new analog allotment, have been amended to request a new DTV allotment in each of those communities.

application for the proposed new NTSC station.<sup>13</sup> Therefore, those parties who filed rulemaking petitions and an accompanying application for the proposed new NTSC facility have made a significant, if not greater investment in their pending NTSC proposal than those parties who filed only an application for an existing allotment.

**IV. The FCC Should Grant Spacing and Other Technical Waivers Where the Applicant or Rulemaking Petitioner Demonstrates that the Proposed Allotment Will Not Cause Prohibited Interference.**

**A. The FCC's Policy Prohibiting Short-Spaced Allotments Should Not Be Applied in This Unique and Limited Context.**

The FCC has a long history of prohibiting short-spaced allotments. The Commission's strict adherence to a fully-spaced allotment scheme is based on its well-established policy of "preserving the integrity of the Table of Allotments and the mileage separation criteria upon which the Table is based."<sup>14</sup> Accordingly, the Commission has granted short-spaced allotments only in rare cases involving highly unusual circumstances.<sup>15</sup> The Commission has stated that "[s]trict adherence to the spacing requirements reflected in the Table is 'necessary . . . in order to provide a consistent, reliable and efficient scheme of [allotments].'"<sup>16</sup> In applying this principle, the Commission has consistently required

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<sup>13</sup> An accompanying FCC Form 301 application was filed in July 1996 by each of the parties who have pending rulemaking petitions seeking the allotment of new analog or DTV stations at the following communities: Oro Valley, Arizona; Benton, Arkansas; Boynton Beach, Florida; Derby, Kansas; Plaquemine, Louisiana; Westbrook, Maine; Rio Rancho, New Mexico; New Castle, Pennsylvania; and Bartlett, Tennessee.

<sup>14</sup> *Chester and Wedgefield, South Carolina*, 5 FCC Rcd 5572 (1990).

<sup>15</sup> See, e.g., *Petition for Rule Making to Amend Television Table of Assignments to Add New VHF Stations in the Top 100 Markets and to Assure that the New Stations Maximize Diversity of Ownership, Control and Programming*, BC Docket No. 20418, *Report and Order*, 81 FCC 2d 233 (1980) ("VHF Top 100 Markets"), *recon. denied*, 90 FCC 2d 160 (1982), *aff'd sub nom. Springfield Television of Utah, Inc. v. FCC*, 710 F.2d 620 (10<sup>th</sup> Cir. 1983).

<sup>16</sup> *In the Matter of Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Pueblo, Colorado), Report and Order*, 10 FCC Rcd 7662, 7667 (1999) (quoting (footnote continued on next page)

that the public interest benefits of a proposed short-spaced allotment outweigh the public interest benefit of maintaining the minimum spacing rules.<sup>17</sup> Where the proponent of a new allotment has failed to demonstrate a compelling need for departing from the established distance separation standards, the Commission has not granted a waiver of the minimum spacing rules for allotment purposes. *Id.*

Nevertheless, the FCC's longstanding rationale for prohibiting short-spaced allotments – preserving the integrity of the NTSC Table of Allotments – has little, if any, relevance in this unique and limited context in which the licensing of NTSC stations has come to an end. The pending NTSC proposals represent what will be the last analog television stations. Thus, the Commission's interest in preserving the integrity of the NTSC Table has substantially less significance in this narrow context because the pending rulemaking petitions represent the last analog allotment proposals that the Commission will ever process. Indeed, the Commission recognized the diminished significance of the Table of Allotments in *Achernar Broadcasting Company*, 15 FCC Rcd 7808 (2000) ("*Achernar*"). In that case, the Commission granted an application for a new analog television station to operate on Channel 64 at Charlottesville, Virginia and, in the same proceeding, modified the station's construction permit to specify operation on Channel 19 without initiating a notice and comment rulemaking proceeding. In doing so, the Commission stated as follows:

[D]ue to the imminent switch to digital television, the Analog Table of Allotments has ceased to function as an evolving mechanism to be

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*Chester and Wedgefield, South Carolina*, 5 FCC Rcd at 5572), *vacated and remanded on other grounds, Sangre de Cristo Communications, Inc. v. FCC*, 139 F.3d 953 (D.C. Cir. 1998), *affirmed on remand*, 16 Comm. Reg. (P&F) 610 (1999) ("*Pueblo, Colorado*").

<sup>17</sup> See *Pueblo, Colorado*, 10 FCC Rcd at 7667, citing *London, Kentucky*, 7 FCC Rcd at 5937.

modified to reflect changing needs and technology. Instead it exists solely to preserve the status quo (and in particular, interference-free analog television service) during the DTV transition. . . . *Adding analog Channel 19 to the Table of Allotments is, in sum, an essentially ministerial act designed purely to ensure the continuing accuracy of the Table.*

15 FCC Rcd at 7821 (emphasis added).

Furthermore, the “integrity” that the NTSC Table of Allotments may have once had has been completely eviscerated by the paired digital allotments, which violate the distance separation requirements to a substantial degree. In electing to assign a paired DTV channel to all eligible NTSC stations, the Commission was forced to forego the minimum distance separations requirements and create many substantial co- and adjacent-channel short-spacings between analog and digital allotments. As a result, the digital allotment scheme is based primarily on interference criteria. Therefore, the Commission’s policy of attempting to preserve the integrity of the NTSC Table no longer can serve as the basis for prohibiting short-spaced analog allotments because the “integrity” of the Table no longer exists. Indeed, at this final stage in the licensing of new analog stations, the FCC’s overriding concern should be to preserve interference-free television service during the DTV transition, rather than attempting to preserve the interstation separation standards which were essentially destroyed by the DTV Table of Allotments.

**B. Waiver Requests Must Be Given the Requisite “Hard Look.”**

It is well established that the Commission is “required to give waiver requests a ‘hard look’ and may not treat well-pleaded waiver requests in a perfunctory manner.”<sup>18</sup> Indeed, as the D.C. Circuit has made clear:

. . . [A] general rule, deemed valid because its overall objectives are in the public interest, may not be in the “public interest” if extended to

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<sup>18</sup> *VHF Top 100 Markets*, 90 FCC 2d 160, 166 (1982) (reconsideration order), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.

*WAIT Radio*, 418 F.2d at 1157.

In processing the pending applications and allotment rulemaking petitions for new analog stations to operate on Channels 52-58, the Commission should consider and grant waivers of its technical rules, including, *inter alia*, waivers of the distance separation requirements, the UHF “taboos,” and the maximum to minimum ratio contained in Section 73.685(e) of the FCC’s rules. In particular, the Commission must determine whether the policy which underlies its distance separation requirements would be significantly undermined in light of the substantial and broad-reaching public interest benefits that would result from a waiver of its spacing rules, especially considering the unique and extremely limited context in which these waiver requests are presented. Because the pending proposals for new NTSC stations represent the last analog television stations that will be licensed, and the distance separation requirements upon which the NTSC Table of Allotments was based have been substantially undermined by the paired digital allotments, the Commission should grant waiver requests for short-spaced allotment proposals where the applicant or rulemaking petitioner establishes that (i) the proposed allotment will not cause prohibited interference to any other television station, or (ii) the requested waiver is consistent with waivers which previously have been granted in the application context.<sup>19</sup>

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<sup>19</sup> In recent years, the Commission has demonstrated an increased willingness to grant short-spacing waivers in the application context where a grant of the requested waiver would not result in interference to other television stations and would provide substantial public benefits. See, e.g., *KRCA License Corp.*, 15 FCC Rcd 1794 (1999) (granted waiver requests for three Los Angeles-area television stations to move to Mt. Wilson despite significant short-spacings); FCC Letter dated December 13, 2000, from Clay C. Pendarvis to Pappas Telecasting of Southern California, LLC (granted waivers of the IF beat and (footnote continued on next page)

Due to the shortage of available spectrum, many of the pending NTSC proposals (both applications and rulemaking petitions) involve a short-spaced allotment and/or other technical waiver request. However, the substantial public interest benefits that would result from these allotment proposals are the same public interest benefits which the Commission sought to achieve in the *Interim Policy on VHF Television Channel Assignments* and *VHF Top 100 Markets*.<sup>20</sup> Indeed, the pending proposals for new analog stations and accompanying requests for waiver of the Commission's distance separation requirements would provide the same, if not greater, public interest benefits than the Commission previously found sufficient to justify a waiver of its distance separation requirements. As stated above, at least eight (8) of the pending applications and ten (10) of the rulemaking petitions seeking new allotments would provide the designated community with its first local television service. These proposals would thereby promote the objectives of Section 307(b) of the Act of providing a fair, efficient and equitable distribution of television broadcast stations among the various states and communities.<sup>21</sup> In addition, the proposed analog and DTV stations would promote the second television allotment priority established in the *Sixth Report and Order* in Docket Nos. 8736 *et al.*, *Amendment of*

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intermodulation interference UHF "taboo" spacing requirements to permit construction of new analog facility at a DTV station's authorized transmitter site atop Mt. Wilson).

<sup>20</sup> See *Interim Policy on VHF Television Channel Assignments*, 21 RR 1695 (1961), *recon. denied*, 21 RR 1710a (1961) ("*Interim Policy*"); *VHF Top 100 Markets*, 81 FCC 2d 233 (1980) (subsequent history omitted). Although the pending allotment requests for channels 52-58 involve a UHF allotment, rather than a VHF station, the public interest objectives set forth in these Commission decisions are equally applicable to the pending NTSC proposals.

<sup>21</sup> 47 U.S.C. §307(b). See *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 217 (1943) (describing goal of Communications Act to "secure the maximum benefits of radio to all the people of the United States"); *FCC v. Allentown Broadcasting Co.*, 349 U.S. 358, 359-62 (1955) (describing goal of Section 307(b) to "secure local means of expression").

*Section 3.606 of the Commission's Rules and Regulations*, 41 FCC 148, 167 (1952), of providing each community with at least one television broadcast station.

The pending applications and allotment rulemaking petitions also would help provide much needed assistance in fostering the development of new national networks by helping to alleviate the critical need for additional broadcast outlets. Specifically, the grant of short-spacing and other technical waiver requests for the pending Channel 52-58 proposals would, in many instances, permit the commencement of a new television service in a top 100 market. The new analog station would provide an opportunity for the emerging new networks to establish a new affiliate, and thereby make progress towards achieving national penetration and a competitive stronghold with the four established networks.

In addition, the grant of short-spacing and other technical waiver requests in the processing of the pending NTSC proposals would, on an individual basis, bring a new television service and new network service to a substantial number of people within the new station's service area, provide an opportunity for new entry into the television broadcast industry, promote viewpoint diversity within the designated television market,<sup>22</sup> and increase competition in the local advertising market. In light of the increasing consolidation in the media industry, the substantial public interest benefits that would result from a grant of the pending waiver requests have even more significance today than those that existed at the time the *Interim Policy* and *VHF Top 100 Markets* were adopted.

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<sup>22</sup> The Commission previously has found that new television stations help to foster competition between networks and create opportunities for increased broadcast diversity and new entry. See *Reallocation of Television Channels 60-69, the 746-806 MHz Band*, ET Docket No. 97-157, *Report and Order*, 12 FCC Rcd 22953, 22971 (1998).



## V. The FCC Should Expedite the Processing of Pending NTSC Proposals.

The pending applications and allotment rulemaking petitions for new analog stations were all filed prior to either July 25, 1996 (rulemaking petition deadline) or September 20, 1996 (application deadline).<sup>23</sup> Thus, regardless of whether the pending proposal involves an application or rulemaking petition, the proposals have been pending before the Commission for a minimum of five and one-half (5½) years. These NTSC proposals have had to await the conclusion of the DTV proceeding, the enactment and implementation of the Community Broadcasters Protection Act, and now are subject to both the instant rulemaking proceeding as well as the Upper 700 MHz proceeding.

Despite the Commission's express language in the *Notice* that the Bureau was to suspend processing of only those NTSC proposals for Channel 59, the Bureau adopted a "process but not grant" regulatory policy with respect to all of the pending proposals for new analog stations in the lower 700 MHz band, which effectively resulted in an informal processing "freeze." Indeed, the Bureau has not granted even one proposal for a new analog station in the lower 700 MHz band since the *Notice* was issued. As a result of the lengthy delay in the processing of these proposals and the Bureau's processing "freeze," there are now less than five (5) years before the scheduled end of the transition period. In light of the substantial period of time in which these proposals have been pending before the Commission, and because the vast majority of the pending NTSC proposals will be subject to competing applications and a competitive bidding process, the Commission should make every effort to expedite the processing of these proposals so that the proposed new analog or DTV stations can operate for a meaningful period of time before the end of the transition period. Therefore, the Commission should expressly direct the Bureau to lift

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<sup>23</sup> See *Sixth Further Notice*, 11 FCC Rcd at 10992-93.

its informal processing “freeze” and expeditiously grant those proposals which it processed during the pendency of this proceeding.

## **VI. Conclusion.**

For the reasons stated herein, the Commission should reconsider its decision in the *RFO* and permit the pending applications for new analog stations to propose an analog service on Channels 52-58. In addition, the Commission should reinstate the allotment rulemaking petitions and permit them to provide either an analog or digital service outside the core.

In processing these NTSC proposals, the Commission should waive its technical rules where the applicant or rulemaking petitioner demonstrates that the proposed new allotment would not cause prohibited interference to another television station, or is consistent with waivers which the Commission previously has granted in the application context. Furthermore, because the proposals for new NTSC stations have been pending before the Commission for well over five (5) years, the Commission should expressly direct the Bureau to expeditiously grant these proposals.

WHEREFORE, in light of the foregoing, The WB Television Network respectfully requests that this Petition for Reconsideration be GRANTED.

Respectfully submitted,

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